FILED
07-975 JAN 23 2008
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No. 07-

IN THE
# Supreme Court of the United States

RONALD VOSE,

*Petitioner,*

*v.*

DONALD KLIMENT, Chief of Police of the City of Springfield, in his individual capacity and WILLIAM ROUSE, Deputy Chief of Police of the City of Springfield, in his individual capacity,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is a police officer's speech, in which he advises his superiors and the city's mayor about wrongdoing and corruption of police detectives in a special police department unit for which the officer has no responsibility or authority, which wrongdoing and corruption the police officer investigated and uncovered on his own initiative, is entitled to the protection of the First Amendment under *Garcetti v. Ceballos* 547 U.S. 410, 126 S.Ct. 1951 (2006)?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Ronald Vose, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on October 26, 2007.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Vose v. Kliment et al*, 506 F.3d 565 (7th Cir. 2007), and is reprinted in the Appendix hereto at App. A, 1a-16a.

The opinion and order entered by the District Court in *Vose v. Kliment et al*, No. 3:06-cv-3022 (C.D.IL., March 8, 2007), which Order denied Respondents' Rule 12(b)(6) motion to dismiss Petitioner's Complaint, is not published and is reprinted in the Appendix hereto at App. B, 17a-40a.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 26, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, * * *.

## STATEMENT OF THE CASE

The issue in this case arises from the application by the United States Court of Appeals for the Seventh Circuit of this Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), to deny the protections of the First Amendment to Petitioner Ronald Vose, a police officer with the City of Springfield, Illinois Police Department, who alleged he suffered adverse

employment actions at the hands of Respondents Donald Kliment, Chief of Police, and William Rouse, Deputy Chief of Police, by reason of Vose having blown the whistle about wrongdoing and corruption by detectives in a special unit of the Police Department that investigated major crimes, which misconduct Vose had investigated and discovered on his own initiative.

The Seventh Circuit applied *Garcetti* to reverse the holding of the District Court, ruling on a Rule 12(b)(6) motion to dismiss, that Kliment and Rouse were not entitled to qualified immunity from Vose's civil rights complaint which sought damages from Kliment and Rouse for retaliating against Vose through various adverse employment actions for Vose's exercise of his First Amendment Rights in speaking out about the wrongdoing of fellow police officers. The Seventh Circuit "consider[ed] the *Garcetti* standard of 'official duties' to be clear enough" [App. 15a] and held that "[w]hile Vose may have gone beyond his ordinary *daily* job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations." [emphasis in original] App. 15a.

In 2004, Vose, a sergeant supervising the Police Departments' narcotics unit, learned of alleged drug investigations being undertaken by detectives in the Police Department's major case unit, a separate unit over which Vose had no supervisory responsibilities. Concerned that the major case unit activities could impact his narcotic unit activities, Vose, on his own initiative, conducted an investigation of the major case

unit activities. Vose's investigation led him to conclude that major case unit detectives were not only violating Police Department policies regarding search warrants and confidential sources, but that the detectives were filing inaccurate, misleading or false affidavits with the courts to obtain search warrants, which warrants the detectives then used as a pretext to conduct searches for the purpose of obtaining information related to other crimes for which there was no basis to obtain a search warrant.

Vose blew the whistle on the activities of these detectives to his superiors, including Chief of Police Kliment and Deputy Chief of Police Rouse. Vose also became concerned that Rouse and Kliment were taking no action and in effect covering up for the detectives and Vose voiced this concern to Rouse and Kliment. Concerned that Kliment may not take action, Vose voiced his concerns to the Mayor of the City of Springfield.

From the time Vose started voicing his concerns, and even after he voiced his concern to the Mayor, Vose alleged that he was subjected to a series of adverse employment actions by Kliment and Rouse, including disciplinary reprimands, and culminating in Vose's demotion from a supervisory position in a criminal investigation unit to the patrol division[1]. Believing that

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[1] The Seventh Circuit stated that Vose met with the Mayor on April 14, 2005, but "the alleged retaliatory acts of interference began sometime between the summer of 2004 and March of 2005." App. 10a. Vose's Complaint, however, alleged that he was subjected to adverse employment action after he met with the Mayor (Complaint, pars. 53-57). The Seventh Circuit stated that (Cont'd)

he had no credibility to his superior officers such that it was intolerable for Vose to continue to work as a police officer, Vose felt forced to resign, which he did on January 19, 2006. Vose then filed his complaint to seeking redress for the retaliatory acts of Kliment and Vose directed against him.

### A. The Complaint of Petitioner Ronald Vose

On February 1, 2006, Petitioner filed his complaint in the District Court alleging that his First Amendment constitutional rights were violated when Respondents Kliment and Rouse retaliated against him through various adverse employment actions for speaking out about the unlawful conduct of fellow police officers in the Police Department. The following are the essential allegations that Vose made in his complaint.

At the time of he spoke out, Vose was a police sergeant in the narcotics unit in the Springfield Police Department and had been with that Department for more than 26 years, including over 13 years in the narcotics unit. As a sergeant in the narcotics unit, Vose supervised the narcotics unit and reported directly to a Lieutenant Dodd, who in turn reported to

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(Cont'd)

Vose did not "assert" an "argument" that his discussion with the Mayor was a motivating factor for the retaliation. App. 9a-10a, n. 3. This case was before the Seventh Circuit on an appeal from a denial of qualified immunity ruling and thus the only matter of record before the Seventh Circuit was the sufficiency of Vose' Complaint, not evidence that may be discovered that linked Vose's discussion with the Mayor to the subsequent adverse employment action directed against him by Kliment and Rouse.

Respondent Rouse, the Deputy Chief of Police, who in turn reported to Respondent Kliment, the Chief of Police.

In 2004, while working in the narcotics unit, Vose learned that detectives in the Springfield Police Department major case unit, a unit which Vose did not supervise, were using alleged drug investigations as a means to gather evidence by searching garbage from specific residences or locations in order to have a lawful basis to obtain search warrants for those locations. Vose was concerned that this search technique, called a "trash rip", could compromise on-going drug investigations being conducted by his unit and Vose was also concerned about the lack of coordination between the narcotics unit and the major case unit. Vose's concerns prompted him to undertake his own investigation of the matter. Vose reviewed various search warrant applications made by the major case unit and discovered that the major case unit detectives were not following Springfield Police Department procedures for obtaining search warrants, were violating laws applicable to the search warrant process and had filed false or misleading affidavits with the courts in support of the search warrants. During the summer and fall of 2004, Vose brought these concerns to the attention of his supervisors, including Rouse and Kliment.

In December 2004, Rouse ordered Vose to report in writing about the alleged misconduct of the major case unit detectives. On February 14, 2005, Vose told Rouse that due to the sensitive nature of his written report, which included criticism of Rouse's inaction, Vose intended to deliver his report directly to Kliment. On

March 2, 2005, Vose delivered his report to Kliment. Around that time, two newspapers articles were published regarding the alleged misconduct and perjury by the major case unit detectives.

Between the summer of 2004 and March 2, 2005, Rouse began interfering with the operations of the narcotics unit by revising work schedules and assigning another sergeant to the narcotics unit, which resulted in action taken by the narcotics units without the supervision of Vose.

On April 12, 2005, Vose met with Kliment, Rouse and two other police officers. Kliment told Vose to either "get along" with the detectives and supervisors about whom Vose had voiced concern or to request a transfer out of the narcotics unit to the patrol division. Vose was instructed to make that decision and to report it to Kliment on April 15, 2005. Worried that Rouse and Kliment were going to cover up his complaints about the misconduct Vose met with the Mayor of the City of Springfield on April 14, 2005 to discuss his concerns.

At 4:50 p.m. on April 15, 2005, Vose delivered a memorandum to Kliment with his decision to transfer out of the narcotics unit noting that he considered the transfer to be involuntary. Four days later Rouse issued a written reprimand to Vose for delivering his memorandum to Kliment later than ordered. Rouse ordered Vose to sign the reprimand. On April 25, 2005, Vose sent another memorandum to Kliment contesting the reprimand. Pursuant to Kliment's directive, Rouse advised Vose that he would be transferred from the narcotics unit to the patrol division effective May 1, 2005.

On May 14, 2005, Vose was issued a written reprimand arising out of a November 2004 alleged confrontation at the courthouse between Vose and one of the detectives about whom Vose had spoken out. That incident had led to Vose being subjected to an internal affairs investigation of Vose on February 23, 2005.

Three days after Vose delivered to Kliment his decision to involuntary transfer to the patrol division, Vose found two empty boxes with his name on them outside his office, insinuating that Vose was to be "sent packing". After Vose transferred to the patrol division, a command officer advised other Springfield police officers that Vose's "career in [the criminal investigation division] is history" and that Vose had "burned his bridges. Vose felt forced to resign from the Springfield Police Department, and did so on January 19, 2006. The following month Vose filed his civil rights suit against Respondents Kliment and Vose.

**B. The Motion Proceedings Below**

In response to Vose's Complaint, Respondent's Kliment and Rouse filed a Rule 12(b)(6) motion to dismiss. Among its several asserted grounds, Respondents' motion to dismiss asserted that they were entitled to qualified immunity against Vose's claims because the applicable law on the rights of government employees to speak out was not clearly established at the time of the events. Respondents based their qualified immunity argument on the fact that after the underlying events and after Vose filed his Complaint, this Court clarified and narrowed the applicable law in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006).

On March 8, 2007, the District Court denied Respondents' motion to dismiss Vose's Complaint, finding that Vose's right to speak out on matters relating to police misconduct without being subjected to retaliatory employment actions was clearly established before the events of the case and that *Garcetti* did not affect nor create this right. The District Court concluded, therefore, that Kliment and Rouse were not entitled to qualified immunity against Vose's claims.

The Respondents appealed to the Seventh Circuit, which reversed the District Court's denial of qualified immunity to the Respondents. The Seventh Circuit held that *Garcetti* governed the disposition of the qualified immunity issue and that Vose's speech, for which he claimed to have been subject to retaliation, was not protected by the First Amendment. The Seventh Circuit held that while Vose "may have gone beyond his ordinary *daily* job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant in the narcotics unit to ensure the security and propriety of the narcotics unit's operations." App. 15a. The Seventh Circuit concluded that because no constitutional right was violated Vose's Complaint failed to state a claim under 42 U.S.C. § 1983. App. 15a.

## REASONS FOR GRANTING THE PETITION

### Introduction

This case involves a question implicating a constitutional protection, namely to what extent did this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), limit the First Amendment protections against retaliation to police officers who speak out about the wrongdoing and corruption of fellow officers for whom they have no responsibility or authority. *Garcetti* did not answer this question.

Wrongdoing and corruption by police officers is a fundamental matter of public concern. Speaking out about police wrongdoing and corruption has long been recognized as a fundamental and protected right of citizens in this country *Connick v. Myers*, 461 U.S. 138, 148 (1983) (speech that seeks to "bring to public light actual or potential wrongdoing or breach of public trust" is considered protected speech); *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997) (speech about the misconduct of public officials concerning the operation of a police department is clearly a matter of public concern); *Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000) (noting the importance of public employee's right to "expose misdeeds and illegality in their departments"). The actions of police officers are often carried out without meaningful supervision and oversight and the wrongdoing and corruption of police officers is usually known only to fellow officers. Roberta Johnson, *Whistleblowing And The Police*, Rutgers University Journal of Law and Urban Policy, Vol. 3, pg.

74, 75 (2005)[2]. Regrettably, such wrongdoing and corruption may also be known to and tolerated by the very supervisors to whom the fellow officer must, by reason of the chain of command requirements, address the wrongdoing and corruption. Oftentimes, there is no state statutory or common law protection[3]. The well-documented police "code of silence" further militates against police officers coming forward without fear of retribution, for police officers are highly dependent upon and loyal to their peers. *See* David Weisburd et al., *Police Attitudes Towards Abuse of Authority: Findings from a National Study,* Nat'l Inst. Of Justice Research in Brief (U.S. Dept. of Justice Office of Justice Programs, Washington, D.C.), May 2000, at 1[4]; *see also Ariza v. City of New York*, 1996 WL 118535 (E.D.N.Y. Mar. 7, 1996) at *5 (discussing the existence and consequences of such a code of silence); *McLine by and Through Harvey v. City of Chicago*, 742 F. Supp. 994, 1001-03 (N.D. Ill. 1990) (discussing the code of silence). The failure to provide protection to the "Frank Serpicos" in the police

[2] This article is available at http://www.rutgers policyjournal.org/journal/vol3issue1current-Issues/ Johnson_Whistle-blowing.pdf.

[3] At the time when Vose spoke out, Section 5 of the Illinois Whistleblower Act expressly excluded Aany governmental entity" from the definition of "employer" [740 ILCS 174/5]. Nor did Vose have the protection of the Illinois common law for the Illinois Supreme Court had refused to extend the tort of retaliatory discharge to encompass the exercise of free speech. *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 528, 478 N.E.2d 1354 (1985).

[4] This study is available at http://www.ncjrs.gov/pdffiles1/ nij/181312.pdf.

department[5], can only discourage police officers from acting responsibly and promotes the wrongdoing and corruption.

This case raises this critical First Amendment question in the context of the pleading stage of the case. Vose filed his complaint prior to this Court's *Garcetti* decision. Vose's complaint has now been dismissed by reason of a Rule 12(b)(6) motion asserting qualified immunity. The Seventh Circuit dismissed Vose's complaint by applying what it considered a clear statement of the standard in *Garcetti*–"official duties" --to a complaint whose only true reference to Vose's "official duties" was the simple allegation that Vose was the supervisor of the Police Department's narcotics unit. Complaint, at pars. 10, 13-14.

Rather than focusing on Vose's "official duties", and whether that included any responsibility for Vose to investigate the potential wrongdoing and corruption of officers in another unit and to report that to superiors, the Seventh Circuit made the focus of the analysis Vose's allegation that his investigation was prompted by Vose's concern that "the alleged misconduct could directly affect his narcotics unit." App. 11a-12a. From this the Seventh Circuit arbitrarily extended the *Garcetti* standard of "official duties", to find that Vose's official duties included "[making] sure that his unit's

[5] The "Frank Serpico" reference refers to the well-known story of plainclothes New York City police officer Frank Serpico who blew the whistle on systemic police bribery in the 1960s and early 1970s in the New York City Police Department, including the cover-up by superior officers. Maas, Peter, *Serpico.* New York: Viking Press (1973).

investigations were not compromised by some outside influence, or . . . [coordinating] his unit's work with other related units in the police department." App. 12a. The Seventh Circuit acknowledged that Vose "may have gone above and beyond his routine duties by investigating and reporting suspected misconduct in another police unit" [App. 15a], but found that Vose, being "responsible for the operations of the narcotics unit" did not speak as a citizen when he spoke out about "alleged misconduct that may affect his unit . . . despite not having explicit responsibility for the detectives involved or the search warrants at issue." App. 12a. Thus the Seventh Circuit concluded that Vose's speech was unprotected as it was made pursuant to his official responsibilities.

The *Garcetti* standard of "pursuant to official duties" is not clear, particularly as applied to cases such as that of Vose involving a police officer speaking out on wrongdoing and corruption that he discovered on his own initiative of other police officers for whom he has no responsibility or authority. As a consequence, the Seventh Circuit felt free to establish and apply its own standard and it did so in complete derogation of this Court's admonishment in *Garcetti* that courts need to make a practical inquiry into of all the facts and circumstances surrounding the speech and the employment relationship. 126 S.Ct. at 1961-62.

It is evident from the Seventh Circuit's decision that it has pushed *Garcetti* far beyond the limits of what *Garcetti* intended, finding official duties whenever any thread can be found to tie speech to the speaker's work. Other Courts of Appeal have also started to create various other permutations of *Garcetti*'s "pursuant to

official duties" test. The Courts of Appeal, and the District Courts below them, are in need of precise guidance from this Court as to the test to be applied for determining whether a public employee speaks as a citizen deserving First Amendment protection. Nowhere is this more important for the courts then in the context of speech by a police officer who speaks out on the wrongdoing and corruption by fellow police officers and the cover up by their superior officers, where wrongful and/or tainted arrests, trials, convictions and incarcerations result there from.

This case presents this very issue to the Court, and this Court should grant certiorari in this case to bring this issue to the Court for decision. It is coming up to almost two years since the *Garcetti* was issued. Numerous lower court cases have been decided under *Garcetti*. The time is ripe for this Court to revisit the impact of its *Garcetti* decision and to provide further guidance and clarity, especially in the context of police whistle blowing cases. For *Garcetti* is being read as a signal to public employees to keep their mouths shut for fear of being fired by supervisors who don't want to hear about misconduct under their commands. *See, e.g.*, Christopher Dunn, *Civil Rights and Civil Liberties*, 235 N.Y.L.J., June 27, 2006 ("[a]ny public employee who learns of misconduct, but is concerned about the potential for retaliation for disclosing it [is] well-advised not to report that misconduct to supervisors or others inside the government."); *see also, What Price Free Speech? Whistleblowers and the* Ceballos *Decision: Hearing Before the Comm. On Gov't Reform*, 109th Cong. 4 (2006) (statement of Stephen M. Kohn, Chair of the Bd. Of Dir. Of the Nat'l Whistleblower Ctr.) ("[t]he

majority opinion in *Ceballos* created a standard which employees have an incentive to avoid reporting concerns through the chain of command, and are encouraged to immediately file whistleblower disclosures to the news media or other entities outside of their workplace.)

This case is clearly one where there is "serious room for debate". *Garcetti* at 1961. It is impossible to conclude that this Court, in handing down its decision in *Garcetti*, intended that it be used as shield to protect wrongful and corrupt law enforcement activities. This Court should grant certiorari to address the question of the extent to which First Amendment protection extends to police officers who blow the whistle on the wrongdoing and corruption of fellow officers over whom the whistleblower has no responsibility or authority.

## I. THE SEVENTH CIRCUIT'S DECISION HAS CREATED A STANDARD OF "OFFICIAL DUTIES" THAT IS INCONSISTENT WITH THE INTENTIONS OF *GARCETTI*.

In denying First Amendment protection to Vose's whistle blowing about police misconduct, the Seventh Circuit found that the *Garcetti* standard of "official duties" was "clear enough". App. 15a. Yet the Seventh Circuit provided no rationale of what meaning it was reading into or giving to the standard of "official duties". Without making any practical inquiry (*see* Part II, *infra*), the Seventh Circuit simply created its own standard of "official duties", namely that a public employee who supervises a unit always has the general responsibility to report to his superiors any misconduct occurring by other public employees for whom he has no responsibility

and about which misconduct he may be concerned might affect the work of his unit.

It cannot be said that this Courts decision in *Garcetti* provided a "clear enough" standard against which the Seventh Circuit could reach such a conclusion under the circumstances of this case. The strong dissent to this Court's majority's decision in *Garcetti* evidences the absence of a "clear enough" standard. 126 S.Ct. at 1965 at n. 2, 1968 (Souter, J., dissenting). The majority decision in *Garcetti* itself speaks to the lack of clarity in the standard it articulated: "[w]e . . . have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. . . ." 126 S.Ct. at 1961. This lack of clarity in the standard set forth in *Garcetti* is illustrated, for example, by the frustrated expression of the District Court in *Jackson v. Jimino*, 2007 WL 189311 (N.D.N.Y. Jan. 19, 2007) at *16: "As comprehensive as *Garcetti* is, we are still left without a standard or guide to help us balance or maneuver through those public statements that may be mixed, or rather disguised because the scope of job responsibilities are not so manifest." *Accord, Nixon v. City of Houston*, __ F.3d __, 2007 WL 4418165 (5th Cir. Dec. 19, 2007) at *2: "*Garcetti* however, 'did not explicate what it means to speak 'pursuant to' one's 'official duties' [citation omitted]."

The case at bar is clearly one where there is room for serious debate", namely whether the official duties of public employees require that they report wrongdoing and misconduct of fellow employees not under their supervision, out of concern that this wrongdoing and misconduct might affect the public employee's work.

There is room for serious debate as to whether a public employee speaks as a citizen, and thus entitled to First Amendment protection when the public employee blows the whistle on wrongdoing and corruption of his or her fellow police officers, and even their superior officers. For whistle blowing on police wrongdoing and corruption is most assuredly "the kind of activity engaged in by citizens who do not work for the government" for which *Garcetti* stated is the kind of speech that is entitled to First Amendment protection. 126 S.Ct. at 1962.

As a result of the lack of a clear standard, the Seventh Circuit felt free to fashion its own standard, stretching the "official duties" test stated by *Garcetti* into a completely different test. That test, as fashioned by the Seventh Circuit in this case, is that it is always the official duty of a supervisory public employee to protect the integrity of the work of the employee's unit and thus when a public employee, without being tasked to do so, speaks out about wrongdoing and corruption of fellow employees for whom the public employee has no responsibility or authority, where the public employee has taken the initiative to explore the suspected misconduct out of a concern that this misconduct might affect the work that the public employee supervises, there is no First Amendment protections against adverse employment actions for that speech. At least one other court has given an equally unwarranted expansive reading of *Garcetti*. The District Court for the Northern District of Georgia, in *Springer v. City of Atlanta*, 2006 WL 2246188 (N.D. Ga. Aug. 4, 2006) at *3-4, gave no First Amendment protection to a public employee who spoke out about financial mismanagement at his agency because the court found that the law imposed a duty on

all employees to do "whatever the employer might do in the protection of his master's property" and thus the employee had "an obligation as an employee to engage in the speech at issue."

Such a test puts no limits on the "official duties" standard stated by *Garcetti* and stretches the test beyond a practical inquiry and into the realm of totally eliminating any First Amendment rights of public employees. Moreover such a test does not focus on the "official duties" of the employee but improperly focuses on what motivated the public employee to speak. This Court in *Garcetti* took pains to make clear that "[t]he First Amendment protects some expressions related to the speaker's job" [126 S.Ct. at 1959] and "public employees do not surrender all their First Amendment rights by reason of their employment." 126 S.Ct at 1957. Moreover, this Court in *Garcetti* emphasized that "[t]he First Amendment protects some expressions related to the speaker's job" and thus whether the subject matter of the speech involved the speaker's employment is "nondispositive". 126 S.Ct. at 1959.

The decision of the Seventh Circuit in the case at bar is simply irreconcilable with these admonitions of this Court in *Garcetti* and results in a dangerous reading and extension of *Garcetti* which engulfs all speech by public employees under the rubric of official duties simply because an employee's duties motivated the speech, regardless of context, and strips First Amendment protections from all public employee speech simply because it the subject matter of the employee's speech may have a bearing upon the employee's ability

to perform his or her job. The Seventh Circuit' fashioned test erodes and misapplies these principals.

To allow the Seventh Circuit decision to stand will send the message that it is proper under *Garcetti* to interpret the "official duties" test as meaning that a public employee's official duties always encompass speaking out whenever a public employee learns of wrongdoing by anyone at the workplace that might affect the employee's work. Such a test is in derogation of this Court's strong caution about relying upon job descriptions: "[w]e reject ... the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 126 S.Ct. at 1961. Yet this is exactly what, in effect, the Seventh Circuit has done by its decision. For the Seventh Circuit, by its decision in the case at bar, has signaled that it will be reading into every public employee's official duties the duty to ensure the security and integrity of the work they are engaged in, thus will thereby strip public employees of any First Amendment protection should public employees consider speaking out about wrongdoing or corruption in their workplace that concerns them because of its potential impact on the work they are engaged in. In essence the Seventh Circuit is stating that if a public employee gets wind of workplace wrongdoing and corruption outside of the employee's work unit and the employee is motivated on their own to ferret out what may be amiss because of a concern that the apparent wrongdoing and corruption may effect the employee's job duties, then this public employee should take care about exposing the wrongdoing and corruption since that speech is not protected by the First Amendment. This can hardly be

what this Court in *Garcetti* intended as the bright line separating speech that is or is not protected under the First Amendment.

This Court's *Garcetti* decision was silent about how to apply the "official duties" test in the context of a public employee who reports wrongdoing and corruption of fellow employees, and even of supervisors to whom the public employee must report. The *Garcetti*, decision was issued on a record in which the parties stipulated to the fact that the speech by the public employee, a public prosecutor, was pursuant to the public employee's official duties. Thus this Court did not have the opportunity or a basis to clarify its stated "pursuant to official duties" under the circumstances of that case. The decisions of the other Courts of Appeal issued since the *Garcetti* decision further evidence the need for clarification and guidance from this Court. In the absence of clarity, the Courts of Appeals have resorted to their own individual characterizations of the phrase "pursuant to official duties". *See e.g. Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329 (10th Cir. 2007) (speech within the employee's "portfolio" is made pursuant to official duties); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (speech is made pursuant to official duties when it reasonably contributes to or facilitates the employee's performance of the official duty); *Foraker v. Chaffinch*, 501 F.3d 231, 241 (3rd Cir. 2007) (employees expected, pursuant to their job duties, to report problems concerning the operations" of their unit "up the chain of command"); *Kodrea v. City of Kokomo, Indiana*, 2006 WL 1750071 (S.D. Ind. 2006) at *8-9 (comparing "ordinary job duties and an employee's "core function"); *Brammer-Hoelter v. Twin Peaks*

*Charter Academy*, 492 F.3d 1192, 1203 (10th Cir. 2007) (*Garcetti* "made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation"); *Sigsworth v. City of Aurora*, 487 F.3d 506, 511 (7th Cir. 2007) (employee's speech unprotected when the employee was "merely doing what was expected of him"); *Spiegla v. Hull*, 481 F.3d 961, 965-66 (7th Cir. 2007) (employee's speech unprotected because it was "consistent with" the employees "general duties").

Clarification is necessary because the First Amendment jurisprudence in this area should not default back to the "good judgment" of public employers being receptive to constructive criticism [*Garcetti*, 126 S.Ct. at 1962], particularly as in this case where the retaliation for the speech at issue is alleged to be tied directly to the very superior officers whose "good judgment" has to be relied upon. Certainly Ceballos was not helped by internal grievance procedures and as Vose's complaint evidences, his speaking out internally led to retaliation from his superiors. Nor should First Amendment jurisprudence default to the perceived "powerful network" of legislative enactments [*Id.*] that purport to be designed to protect whistleblowers.[6] In the case at

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[6] The inadequacy of such statutes is illustrated by the experience of Jesselyn Radack, a former legal advisor in the Justice Department's ethics unit who advised her agency that it would violate ethics rules to have the FBI interrogate John Walker Lindh without his attorneys. Radack blew the whistle internally and then publicly, was forced out of the Justice Department, branded a "turn coat", was disparaged to her new employer in the private sector and put on the no-fly list, all (Cont'd)

bar, when Vose spoke, no such legislative protection existed in Illinois[7] Moreover, as Justice O'Connor observed in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J. concurring), "[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law."

The need for further direction from this Court, in the context of the circumstances presented by the Vose case, is compelling. The concern with wrongdoing and corruption in the workplace is, regrettably, a continuing concern in our society. This concern is heightened where the wrongdoing and corruption occurs within a police department and involves wrongdoing and corruption that directly affects the integrity of the judicial process and the lives of citizens who are involuntarily subjected to criminal prosecution as a consequence of that wrongdoing and corruption. The Seventh Circuit decision in this case should be reviewed as it represents a serious and unwarranted departure from what *Garcetti* intended. If left unreviewed this Court will have signaled to federal courts that any speech by a public employee

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(Cont'd)

notwithstanding the existence of the federal Whistleblower Protection Act. *See* Jesselyn Radack, *Why the Supreme Court Got It Wrong When It Rejected a Government Whistleblower's First Amendment Claim*, Findlaw Writ, http://writ.news.findlaw.com/commentary.20060607_radack.html, and Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatable at Last*, 17 Geo. J. Legal Ethics 125 (2003).

[7] *See* note 3, *supra*.

that has any bearing upon the employee's work deserves no First Amendment protection. No such *per se* rule was stated or intended by *Garcetti* and in the circumstances of whistle blowing on police wrongdoing and corruption, no such *per se* rule should be embodied in our First Amendment jurisprudence as a guiding principle.

## II. THE SEVENTH CIRCUIT FAILED TO COMPLY WITH THIS COURT'S DICTATE IN *GARCETTI* THAT A PRACTICAL INQUIRY MUST BE MADE OF ALL FACTS AND CIRCUMSTANCES SURROUNDING THE SPEECH AND THE EMPLOYMENT RELATIONSHIP OF THE SPEAKER IN ORDER TO DETERMINE WHETHER THE SPEECH IS PURSUANT TO OFFICIAL DUTIES.

Not only did the Seventh Circuit create its own standard as to what constituted "official duties", the Seventh Circuit also failed to comply with this Court's dictate in *Garcetti* that a court must take a practical view of all facts and circumstances surrounding the speech and the employment relationship of the speaker in order to determine whether the speech is pursuant to official duties. 126 S. Ct. at 1961-62. The Seventh Circuit acknowledged the obligation to make this practical inquiry [App. 9a] but did not make or allow for any such practical inquiry.

The case was before the Seventh Circuit on appeal from the denial of a Rule 12(b)(6) motion to dismiss based on qualified immunity. Thus, the Seventh Circuit had only Vose's complaint to review[8]. Vose's complaint,

[8] In its brief to the Seventh Circuit Vose had cautioned that deciding the issue of qualified immunity in the context of the *Garcetti* decision may be premature at this Rule 12(b)(6) motion (Cont'd)

however, was silent as to any of his job duties, stating only that his job was supervisor of the police department's narcotics unit. Complaint at par. 10, 13-14. Unlike *Garcetti*, there was nothing in the record that evidenced any admission by Vose that he had any duty to report wrongdoing or corruption by other police officers nor that he had any duty to protect the lawfulness of the operations of his narcotics unit. The Seventh Circuit had nothing before it from which it could conclude that speaking out about the wrongdoing and corruption of police officers for whom Vose had no responsibility, was particularly within the province of Vose's official duties any more so than that of any other of the police department employees. Rather than making a practical inquiry to determine Vose's official duties, the Seventh Circuit simply conjured up what it deemed Vose's official duties to encompass simply by reason of Vose's job title, and concluded that Vose's official duties as a sergeant of the police department narcotics unit included "ensur[ing] the security and propriety of the narcotics unit's operations" even though this duty "may have gone beyond his ordinary *daily* job duties in reporting misconduct outside his unit." App. 15a. The Seventh Circuit reached this conclusion because it found that Vose's complaint indicated that "his independent investigation stemmed from his concerns about how the detectives misconduct might affect his work in the narcotics unit" and that "lawful operations of narcotics investigations was clearly expected of Vose." App. 14a.

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(Cont'd)

stage and that a remand may be necessary to develop the necessary facts and circumstances. [Brief of Petitioner Vose before the Seventh Circuit, at p.23].

Thus the case at bar stands in distinction to cases such as *Garcetti* and other cases where the speech at issue was stipulated to be pursuant to the employee's official duties, thus permitting a court to draw conclusions from the stipulated facts about the public employee's official duties. *See e.g. Battle v. Bd of Regents*, 468 F.3d 755, 761 (11th Cir. 2006), in which the public employee admitted she had duty to ensure accuracy and completeness of files and to report mismanagement, thus permitting the Eleventh Circuit to conclude that the employee's speech was consistent with the type of activities the employee was paid to do; and *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3rd Cir. 2006), a case where the public employee admitted that he issued his report of the mayor's misconduct pursuant to his official duties to protect the borough.

Moreover, in drawing its conclusion about what was or was not Vose's official duties, the Seventh Circuit crossed the line into impermissible fact finding. As noted by the Third Circuit in *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007), "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law." Other courts post-*Garcetti* have recognized *Garcetti*'s admonishment that a fact based inquiry must be made to determine whether a public employee's speech is pursuant to the employee's official duties. *See e.g. Barclay v. Michalsky*, 451 F. Supp. 2d 386, 395-95 (D. Conn. 2006) (material issues of fact about whether nurse's complaints to supervisor about other employees sleeping on job and using excessive restraints were in the context of nurse's job responsibilities, notwithstanding existence of a work rule requiring employees to report rule violations to their

supervisors); *Drollett v. DeMarco*, Slip Copy, 2007 WL 1851102 (D. Conn. 2007) at *5-6 (fact issue exists as to whether police officers' ordinary job duties or core functions required him to report all kinds of workplace mismanagement up the chain of command).

The Seventh Circuit simply and wrongfully assumed *sub silentio* that Vose could not have proven any set of facts that would have entitled him to relief[9], *i.e.* that his speech about the wrongdoing and misconduct of officers for whom he had no responsibility and about which he discovered on his own initiative, was not pursuant to his official duties.

The Court's admonishment in *Garcetti* that a practical inquiry be made of all relevant facts and circumstances cannot and should not be read as a signal to the courts to dispose of these First Amendment retaliation cases on grounds of qualified immunity at the Rule 12(b)(6) pleading stage in the absence of a clear admission by the public employee whose speech is at issue that the speech was pursuant to official duties. To permit such a result simply reads out of *Garcetti* any meaningfulness to the admonition to make the practical inquiry. In the case at bar no such clear admission as to official duties was made by Vose and Vose's complaint, on its face, does not permit the simple conclusion that no other result could reasonably be proven. Thus the Seventh Circuit erred in reversing the District Court's denial of qualified immunity in this case.

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[9] *Bell Atlantic Corp. v. Twombley*, __U.S. __, 127 S.Ct. 1955, 1964-65 (2007).

## III. THE SEVENTH CIRCUIT'S DECISION IGNORES THE ESSENCE OF THIS COURT'S *GARCETTI* DECISION, NAMELY THAT A PUBLIC EMPLOYEE'S SPEECH IS PROTECTED WHEN IT HAS A RELEVANT ANALOGUE TO SPEECH BY CITIZENS WHO ARE NOT GOVERNMENT EMPLOYEES.

In *Garcetti* this Court's overarching point was that "when a public employee speaks pursuant to employment responsibilities ... there is no relevant analogue to speech by citizens who are not government employees." 126 S.Ct. at 1961. Unlike *Garcetti*, there is a clearly relevant analogue of Vose's speech to speech by citizens who are not public employees, namely any citizen can investigate and report on information about police wrongdoing and corruption to command personnel in police departments and to the mayor of the city whose police department is corrupted. To allow federal appellate court precedent to the contrary to stand as the law of the land seriously erodes First Amendment liberties in the public workplace and distorts the framework embodied in this Court's *Garcetti* decision.

The Seventh Circuit refused to find that Vose's speech had any relevant analogue speech by citizens because the Seventh Circuit determined, simply from the face of Vose' complaint, that the alleged misconduct Vose spoke about "may affect his unit ... despite not having explicit responsibility for the detectives involved or the search warrants at issue." App. 12a. The Seventh Circuit determined that in reporting his suspicions of the detectives' misconduct to his superiors was "merely doing his job." App. 13a-14a. Nothing in *Garcetti* even hints that a public employee's speech has no relevant

analogue to speech by a citizen simply because the motivation of the public employee to speak arises from a concern about the public employee's work. The Seventh Circuit never said it found *Garcetti* as stating this rule nor did the Seventh Circuit reject the notion that a public employee could speak both as a public employee and a citizen at the same time. *Garcetti* did not reject this circumstance for *Garcetti* clearly stated that the fact that a public employee expresses his or her views inside the office or that the public employee's views concerned the subject matter of their employment was not dispositive. 126 S. Ct. at 1959. The Seventh Circuit's decision cannot be justified in the face of these admonitions by the *Garcetti* decision.

Long ago this Court made clear that an employee can speak both as a concerned citizen and as an employee at the same time. *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n.*, 429 U.S. 167, 174-76 (1976). This Court's decisions in *Pickering v. Bd. of Education*, 391 U.S. 563, *Connick, supra*, and *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1978), reinforce this concept. It could not have been the intent of this Court in *Garcetti* to deprive public employees of constitutional protection when they speak out on wrongdoing and misconduct that may affect their work, but afford the same public employees constitutional protect when they chose to bypass their superiors to do their whistle blowing. This defies sound reason, as does the Seventh Circuit's decision in the case at bar. This Court needs to grant certiorari to clarify what it meant by the "relevant analogue" test it has introduced. The context of this case presents a most appropriate vehicle to clarify whether whistle blowing about police

wrongdoing and corruption by a public employee should be protected under the First Amendment just as whistle blowing by a private citizen is protected.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the question presented by this Petition.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 26, 2007

**In the**
**UNITED STATES COURT OF APPEALS**
**for the Seventh Circuit**

No. 07-1792

RONALD VOSE,

*Plaintiff-Appellee,*

*v.*

DONALD KLIMENT, Chief of Police of the City of Springfield, in his individual capacity, and WILLIAM ROUSE, Deputy Chief of Police of the City of Springfield, in his individual capacity,

*Defendants-Appellants.*

Argued September 27, 2007—Decided October 26, 2007

Before BAUER, RIPPLE, and KANNE, *Circuit Judges.*

BAUER, Circuit Judge. Defendants-Appellants Donald Kliment and William Rouse appeal from the district court's denial of their Motion to Dismiss on the basis of qualified immunity. They assert that they are entitled to qualified immunity against Plaintiff-Appellee Ronald Vose's § 1983 claims which allege violations of Vose's First Amendment free speech rights. Vose argues

that his speech was protected, and therefore Kliment and Rouse's retaliation in response to that speech violated his constitutional rights. The district court determined that Vose's speaking out about fellow police officer misconduct was not part of his job duties, and thus was protected speech that was clearly established before the events of this case. Based on this, the district court held that Kliment and Rouse were not entitled to qualified immunity. We disagree with the district court's conclusion that Vose's speech was constitutionally protected, and therefore reverse its denial of qualified immunity to Kliment and Rouse.

## I. Background

In 2004, Vose was a police sergeant in the narcotics unit of the City of Springfield Police Department and had been with the Department for more than 26 years, including over 13 years in the narcotics unit. At that time, Donald Kliment was the Chief of Police of the City of Springfield, and William Rouse was the Deputy Chief of Police in charge of the investigations unit. As a sergeant in the narcotics unit, Vose supervised the narcotics unit and reported directly to Lieutenant David Dodson, who in turn reported to Rouse.

While working in the narcotics unit, Vose learned that detectives in the major case unit were using alleged drug investigations as a means to gather evidence by searching garbage from specific residences or locations in order to have a lawful basis to obtain search warrants for those locations. This search technique is called a

"trash rip." Vose was worried that the trash rips could compromise ongoing drug investigations being conducted by his unit, and he was also concerned with the lack of coordination between the narcotics unit and the major case unit. Vose reviewed various applications for search warrants made by the major case unit and discovered that the major case unit detectives were not following City of Springfield Police Department procedures for obtaining search warrants, that the detectives were violating laws applicable to the search warrant process, and that the detectives filed false or misleading affidavits with the courts in support of the search warrants. Vose also learned that search warrants were being obtained by major case unit detectives by claiming that the warrants were for the purposes of obtaining information on drug investigations; in fact, no such drug investigations were undertaken by the narcotics unit. Vose brought these concerns to the attention of his supervisors, including Rouse and Kliment during the summer or early fall of 2004. Vose also voiced his concerns about the detectives' apparent misconduct at Department meetings during the fall of 2004. To Vose's knowledge, neither Kliment nor Rouse had taken any action on his complaints.

On November 16, 2004, Vose told Rouse that some of the detectives from the major case unit were scheduled to testify at a criminal trial and that there may be a problem with their testimony. Rouse told Vose to attend the trial and report back to him. At the trial, Vose learned that documents possessed by the Springfield Police Department had not been turned over to the defense, as

required by law. One of the detectives at the trial confronted Vose and accused him of working for the defendant. Vose reported back to Rouse what he had learned and the accusation made by the major case unit detective. Approximately two weeks later, Vose was served with an internal affairs complaint related to the incident at the trial. In December 2004, Rouse sent Vose a letter ordering him to report in writing about the alleged misconduct of the major case unit detectives, which Vose received immediately before he was scheduled for an approved vacation leave. Vose advised Rouse and Kliment that he would respond upon his return on January 3, 2005.

On February 14, 2005, Vose told Rouse that due to the sensitive nature of his written report on the detectives' alleged misconduct, which included criticism of Rouse's inaction, he would deliver the written report directly to Kliment. Vose delivered the report on March 2, 2005. Around that time, two newspaper articles were published regarding the alleged misconduct and perjury by the major case unit detectives.

Between the summer of 2004 and March 2, 2005, Rouse began interfering with the operations of the narcotics unit by revising work schedules and assigning another sergeant to the narcotics unit, which resulted in action taken by the narcotics unit without the supervision of Vose.

On April 12, 2005, Vose met with Kliment, Rouse, and two other police officers. Kliment told Vose to either

"get along" with the detectives and supervisors about whom Vose had voiced concern or to request a transfer out of the narcotics unit to the patrol division. Vose was apparently instructed to make that decision and to report it to Kliment on Friday, April 15, 2005.[1] Worried that Kliment and Rouse were going to cover up his complaints about the misconduct, Vose met with the Mayor of the City of Springfield on April 14, 2005 to discuss his concerns.

At 4:50 pm on April 15, 2005, Vose delivered a memorandum to Kliment with his decision to transfer out of the narcotics division, noting that he considered the transfer to be involuntary. Four days later, Rouse issued a written reprimand to Vose for delivering his memorandum to Kliment later than ordered. Rouse ordered Vose to sign the reprimand, and on April 25, 2005, Vose sent another memorandum to Kliment contesting the reprimand. Pursuant to Kliment's directive, Rouse advised Vose that he would be transferred from the narcotics unit to the patrol division effective May 1, 2005. On May 14, 2005, Vose was issued a written reprimand arising out of the incident at the trial in November 2004.[2]

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1. The complaint is unclear as to exactly what Vose was required to present to Kliment on Friday, April 15, 2005. Based on Vose's presentation of a memorandum with his decision on Kliment's ultimatum, we reasonably infer that he was instructed to document his decision in writing to Kliment on that date.

2. Vose was subjected to an internal affairs interrogation on February 23, 2005 regarding the November 2004 confrontation with the detective at trial.

Three days after Vose delivered his decision to involuntarily transfer to the patrol division to Kliment, Vose found two empty boxes with his name on them outside his office, insinuating that Vose was to be "sent packing." After Vose transferred to the patrol division, a command officer advised other Springfield police officers that Vose's "career in [the criminal investigation division] is history" and that Vose had "burned his bridges." Vose felt forced to resign from the Springfield Police Department, and did so on January 19, 2006.

On February 1, 2006, Vose filed a complaint in the district court alleging violations of his constitutional rights. Specifically, Vose alleged that his First Amendment rights were violated when Kliment and Rouse retaliated against him for voicing his concerns about the conduct of the major case unit detectives. Vose claimed that Kliment and Rouse retaliated against him through the written reprimands, the interference with his role as supervisor of the narcotics unit operations, and the demotion to the patrol division. Kliment and Rouse moved to dismiss the case, asserting that they were entitled to qualified immunity against Vose's claims because the applicable law on the rights of government employees to speak out was not clearly established at the time of the events. Kliment and Rouse hinged this argument on the fact that the United States Supreme Court clarified and narrowed the applicable law in *Garcetti v. Ceballos*, __ U.S. __, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), which was decided after the alleged violation in this case. On March 8, 2007, the district court denied their motion, finding that Vose's right to speak

out on matters relating to police misconduct without being subjected to retaliatory employment actions was clearly established before the events of this case, and that *Garcetti* did not affect nor create this right. Therefore, the district court held that Kliment and Rouse were not entitled to qualified immunity against Vose's claims. Kliment and Rouse now appeal that determination, and additionally argue that Vose did not have a constitutionally protected right to speak.

## II. Discussion

On appeal, Kliment and Rouse present two arguments in support of their position that they are entitled to qualified immunity. First, they assert that Vose's speech was not constitutionally protected. Secondly, they claim that the rights Vose alleges were violated were not clearly established at the time of the relevant events.

To determine whether an official is entitled to qualified immunity, we look to two issues. First, taken in the light most favorable to the plaintiff, the facts must show the official violated a constitutional right. *Finsel v. Cruppenink*, 326 F.3d 903, 906 (7th Cir.2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we look to see if the right was clearly established at the time of the alleged violation. *Finsel*, 326 F.3d at 906 (citing *Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 616 (7th Cir.2002)).

*Appendix A*

We review the district court's ruling on a motion to dismiss *de novo*. *Sigsworth v. City of Aurora*, 487 F.3d 506, 508 (7th Cir.2007); *Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 471 (7th Cir.2007). We accept all well-pleaded factual allegations in the complaint as true and construe all reasonable factual inferences in favor of the plaintiff. *Sigsworth*, 487 F.3d at 508.

We begin our inquiry with whether Kliment and Rouse violated Vose's constitutional right to free speech. Kliment and Rouse argue that Vose's speech was not constitutionally protected because Vose was speaking pursuant to his official duties as the supervisor of the narcotics unit, and not as a citizen. Vose argues that he spoke as a citizen in reporting the alleged misconduct to Kliment and Rouse, because he discovered the alleged misconduct in an independent investigation that was not part of his duties, and that the detectives were not under his supervision and were in a separate police unit.

The First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern under certain circumstances. *Garcetti v. Ceballos*, __ U.S. at __, 126 S.Ct. at 1957 (2006); *see, e.g.*, *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications

from employer discipline." *Garcetti*, __ U.S. at __, 126 S.Ct. at 1960. Determining the official duties of a public employee requires a practical inquiry into what duties the employee is expected to perform, and is not limited to the formal job description. *See id.* at 1962-63 (explaining that formal job descriptions rarely resemble the actual duties of an employee for First Amendment purposes).

We focus our analysis exclusively on the initial oral statements made by Vose to Kliment and Rouse because all other speech regarded the same alleged misconduct and most of it was pursuant to direct orders of Rouse and Kliment. While Vose alleged that newspaper articles were published on the alleged misconduct, he did not allege in his complaint that he spoke to the newspapers. Instead, it appears that Vose included this information to bolster his position that the alleged misconduct is a matter of public concern. We accept that police misconduct is a matter of public concern, but as this analysis illustrates, that is no longer the initial inquiry on First Amendment retaliation claims. *See Garcetti*, — U.S. at __, 126 S.Ct. at 1958 ("The first [inquiry] requires determining whether the employee spoke *as a citizen* on a matter of public concern.") (emphasis added).

Furthermore, we acknowledge that Vose has pleaded that he had a discussion with the Mayor of Springfield and that he believes Kliment was aware of this discussion. However, taking the facts in the light most favorable to Vose, we cannot find that Vose's discussion with the Mayor on April 14, 2005 was a motivating factor

for the retaliation.[3] *See Mt. Healthy City Sch. Dist. Bd. Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (employee must show that his conduct was constitutionally protected and was a "substantial" or "motivating" factor in the retaliation); *see also Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir.2006) ("To make out a prima facie case of first amendment retaliation, a public employee must present evidence that: (1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action."). Vose contends that the retaliation took four forms: (1) the interference with Vose's control over operations of the narcotics unit; (2) the written reprimand for late submission of Vose's response to the ultimatum to transfer or "get along"; (3) the demotion to the patrol division; and (4) the written reprimand regarding the trial incident. While the meeting with the Mayor took place on April 14, 2005, the alleged retaliatory act of interference began sometime between the summer of 2004 and March of 2005.

Likewise, the ultimatum to "get along" or transfer to the patrol division was given on April 12, 2004. The written reprimand for the trial incident was issued after the meeting with the Mayor, but an internal affairs complaint regarding this incident was filed on November 30, 2004. As such, it would simply appear to be a natural sequence of events: that the written reprimand followed the complaint filing and the interrogation process described by Vose's complaint.

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3. Nor does Vose assert this argument.

Lastly, although Vose received a written reprimand for allegedly turning in a late memorandum, he had already requested (albeit forced) the transfer to the patrol division, and Vose contested the reprimand. Vose does not allege any further retaliatory action taken based on an alleged tardiness of his memorandum or his decision to contest the written reprimand. *See Massey*, 457 F.3d at 716 (employee must suffer a deprivation). Therefore, we cannot reasonably infer that the alleged retaliation was motivated by Vose's meeting with the Mayor.

Vose's initial statements regarding the alleged misconduct of the detectives in the major case unit were pursuant to his official duties as supervisor of the narcotics unit. Vose's complaint states that Vose learned of the major case unit detectives' trash rips when he was working in the narcotics unit, and that based on learning of the trash rips, he reviewed various applications for search warrants made by the major case unit detectives because he was concerned about "the possibility of these trash rips [compromising] ongoing investigations being conducted by his unit" and "the lack of coordination between the activities of the major case unit and the narcotics unit."

While Vose contends that his official duties as supervisor of the narcotics unit did not include responsibility for investigating potential misconduct of officers in another unit, this argument fails to consider his own admitted interests in the investigation: that the alleged misconduct could directly affect his narcotics

unit. As a supervisor of the narcotics unit, it can hardly be said that Vose did not have a duty to make sure his unit's investigations were not compromised by some outside influence, or that Vose did not have a duty to coordinate his unit's work with other related units in the police department. Vose may have gone above and beyond his routine duties by investigating and reporting suspected misconduct in another police unit, but that does not mean that he spoke as a citizen and not as a public employee. "Th[e] focus on 'core' job functions is too narrow after *Garcetti*, which asked only whether an 'employee's expressions [were] made pursuant to official responsibilities.' " *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir.2007) (quoting *Garcetti*, __ U.S. at __, 126 S.Ct. at 1961). Because Vose was responsible for the operations of the narcotics unit, his speech regarding alleged misconduct that may affect his unit was made pursuant to his official responsibilities, and not as a private citizen, despite not having explicit responsibility for the detectives involved or the search warrants at issue.

Vose seeks to distinguish three post-*Garcetti* Seventh Circuit cases in arguing that he spoke as a citizen, and not as a public employee. First, in *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir.2006), an on-duty sergeant criticized her superior's plan to reduce the number of officers under her supervision. The *Mills* Court held that the sergeant's criticism was not the speech of a citizen because her speech was her "contributi[on] to the formation and execution of official policy." 452 F.3d at 648.

Vose asserts that his speech, unlike the sergeant's speech in *Mills*, was not a criticism of official policy, but instead was speech designed to expose the wrongdoings of officers beyond his control, and therefore Vose spoke as a citizen, not a public employee. Vose misses the point. It is not the negative or policy-oriented content of the speech that is the focus of the inquiry post-*Garcetti;* it is whether the speech was pursuant to his official duties or whether the expression was that of a private citizen. *Garcetti*, __ U.S. at __, 126 S.Ct. at 1959-60.

Next, Vose argues that his case is distinguishable from *Spiegla v. Hull*, 481 F.3d 961 (7th Cir.2007). In *Spiegla*, a corrections officer responsible for maintaining prison security reported a breach of a prison security policy by another prison employee to her superior. 481 F.3d at 962-63. The *Spiegla* Court held that the corrections officer was speaking pursuant to her official duties—not as a citizen—when she reported the security policy breach because ensuring compliance with prison security policy was part of what she was employed to do. *Id.* at 965-66.

Vose asserts that *Spiegla* differs because the corrections officer was responsible for prison security, which is what her speech addressed, but Vose was not responsible for policing the major case unit detectives. This distinction fails as well, since Vose was employed to oversee the narcotics unit's investigations, which Vose himself stated could have been compromised by the alleged misconduct of the major case unit detectives. Like the corrections officer, Vose was merely doing his

job when he reported to his superiors his suspicions of the detectives' misconduct. A public employee's more general responsibilities are not beyond the scope of official duties for First Amendment purposes. *See Garcetti*, __ U.S. at __, 126 S.Ct. at 1961; *Spiegla*, 481 F.3d at 966.

Finally, Vose attempts to distinguish *Sigsworth v. City of Aurora*, 487 F.3d 506 (7th Cir.2007). *Sigsworth* involved a police investigator working on a multi-jurisdictional task force investigating gang and drug activity. 487 F.3d at 508. Sigsworth, the police investigator, suspected that certain task force members were tipping off the targets in a task force drug raid, and reported this concern to his supervisors. *Id.* This Court found that Sigsworth "was merely doing what was expected of him" as a member of the task force with supervisory responsibilities and pursuant to task force policy, and therefore his speech was not entitled to First Amendment protection. *Id.* at 511.

Vose claims that the voluntary and independent nature of his investigation into the suspected wrongdoings of the major case unit detectives was not expected of him as a supervisor in the narcotics unit, which distinguishes him from Sigsworth. Again, Vose ignores his own statements that his independent investigation stemmed from his concerns about how the detectives' misconduct might affect his work in the narcotics unit. Ensuring the lawful operations of narcotics investigations was clearly expected of Vose.

In his final argument, Vose asserts that *Garcetti* was a narrow decision limited to the facts of the case.[4] Vose asks us to interpret the holding in *Garcetti* to mean that only speech pursuant to a public employee's ordinary daily job duties are unprotected by the First Amendment. Such a reading, Vose claims, will foster the free flow of ideas as constitutionally guaranteed by the First Amendment. We decline to read beyond the text of *Garcetti* since we consider the *Garcetti* standard of "official duties" to be clear enough. While Vose may have gone beyond his ordinary *daily* job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations.

For the reasons stated, we find that Vose's speech, albeit an honorable attempt to correct alleged wrongdoing, was not protected by the First Amendment. Kliment and Rouse are entitled to qualified immunity. Because no constitutional right was violated, Vose's complaint fails to state a claim under § 1983.

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4. *Garcetti* involved a deputy district attorney who alleged that he was subjected to employment retaliation for writing a disposition memorandum in which he recommended dismissal of a case on the grounds of government misconduct. The Supreme Court held that the deputy district attorney's memorandum was work product created while performing his official duties, and therefore was not entitled to First Amendment protection. *See generally Garcetti*, — U.S. ——, 126 S.Ct. 1951, 164 L.Ed.2d 689.

## III. Conclusion

We Reverse the district court's holding that Kliment and Rouse were not entitled to qualified immunity.

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION ENTERED MARCH 8, 2007

## IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS SPRINGFIELD DIVISION

No. 06-3022

RONALD VOSE,

Plaintiff,

v.

DONALD KLIMENT, Chief of Police of the City of Springfield, in his individual capacity; and WILLIAM ROUSE, Deputy Chief of Police of the City of Springfield, in his individual capacity,

Defendants.

### OPINION

JEANNE E. SCOTT, U.S. District Judge.

This matter comes before the Court on Defendants Donald Kliment and William Rouse's Motion to Dismiss (d/e 17). The Defendants have filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth below, the Defendants' Motion is DENIED.

*Appendix B*

## BACKGROUND

Plaintiff Ronald Vose has filed a two-count Complaint (d/e 1), alleging violations of 42 U.S.C. § 1983 based on injuries resulting from deprivations of his First and Fourteenth Amendment rights. In Counts 1 and 2, Vose contends that Defendants retaliated against him for exercising his First Amendment rights to freedom of speech in violation of his First and Fourteenth Amendment rights. On Defendants' Motion, the Court must accept as true all well-pleaded factual allegations contained in the Complaint and draw all inferences in the light most favorable to the non-moving party. *Hager v. City of West Peoria*, 84 F.3d 865, 868-69 (7th Cir.1996); *Covington Court Ltd. v. Village of Oak Brook*, 77 F.3d 177, 178 (7th Cir.1996). The allegations set forth in the Complaint are as follows. Defendant Kliment is Chief of Police in the Springfield Police Department (Department). Defendant Rouse is Deputy Chief of Police in the Department. In that capacity, Rouse is responsible for overseeing the Department's investigations division. Defendant Rouse reports to Assistant Chief of Police Ralph Caldwell and to Defendant Kliment.

At all times relevant to this case, Plaintiff Ronald Vose was a police officer in the Department. As of 2004, Vose was a 26-year veteran of the Department with over 13 years of narcotics related experience. In July 2002, Vose was promoted to Sergeant in the narcotics unit of the Department. Vose was a supervisor of the narcotics unit and reported directly to Lieutenant David Dodson, who in turn reported to Defendant Rouse.

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Sometime before the summer of 2004, Vose learned that several detectives in the major case unit, which was separate from the narcotics unit, "were using alleged drug investigations as a means to gather evidence by allegedly searching the trash from a specific residence or specific location in order to have a lawful basis to obtain search warrants for the specific residence or specific location. This search technique was and is commonly referred to as 'trash rips.' " *Complaint*, ¶ 16.

Vose became concerned that this practice could not only potentially compromise on-going drug investigations being conducted by the narcotics unit, but also increase the lack of coordination between the activities of the major case unit and the narcotics unit. Based on these concerns, Vose reviewed various search warrant applications previously prepared by the major case unit detectives and the corresponding warrants issued by judges based on such applications. Following his review, Vose learned that the major case unit detectives were: (1) failing to follow the Department's proper procedures for obtaining search warrants; (2) violating laws applicable to the search warrant process; (3) filing factually inaccurate, misleading, or false affidavits with the courts in support of their applications for search warrants; (4) claiming the use of confidential sources who had not been registered with the Department in accordance with established practices of the Department; (5) using the information obtained from these confidential sources as the basis for search warrant applications prepared by the detectives; and (6) using the obtained searched warrants for purposes

gathering information on drug investigations even though no such drug investigations were being undertaken by the narcotics unit. Vose also became concerned that "the drug investigations were pretextual, were not always based upon probable cause and were apparently being used for purposes of obtaining information related to other crimes for which there was no basis to obtain a search warrant." *Complaint*, ¶ 22.

Vose aired his concerns to his immediate supervisor, Dodson, as well as to Defendants Rouse and Kliment. Defendant Kliment assured Vose that the matter would be addressed. Neither Defendant Kliment nor Defendant Rouse, however, did anything to address the matter. In the fall of 2004, Vose continued to express his concerns about the improper way in which the major case unit detectives were carrying out their official duties (including their use of improper techniques to obtain search warrants and their failure to properly document cash payments to the undocumented sources) in department meetings, during which time Defendant Rouse was present.

On November 16, 2004, Vose informed Defendant Rouse that the major case unit detectives, about whom Vose had previously complained, were scheduled to testify at the Sangamon County courthouse in a trial involving Defendant Anthony Grimm. Vose further advised Defendant Rouse that their testimony may be problematic and that Rouse should attend the trial. Defendant Rouse directed Vose to attend the *Grimm* trial instead and instructed Vose to report back to him.

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In accordance with Defendant Rouse's instructions, Vose attended the trial. During the trial he learned that documents in the possession and control of the Springfield Police Department had not been turned over to the defense prior to trial, including documents in the files of one of the detectives.

During Vose's attendance at the trial, one of the detectives approached Vose and questioned whether Vose was working for the defense in the *Grimm* trial. Vose attended the trial for the sole purpose of reporting his observations of the trial proceeding to Defendant Rouse. Vose informed Defendant Rouse that one of the detectives had accused him of working for the defense in the *Grimm* case. Sometime later, Defendant Rouse informed Vose that the detectives present at the trial and their supervisor were in the process of initiating an internal affairs complaint against him based upon the events that transpired in the courtroom during the *Grimm* trial. On November 30, 2004, Vose was served with an internal affairs complaint concerning the incident at the courthouse.

Sometime after Vose had aired his concerns regarding the wrongdoing, Defendant Rouse began interfering in the operation of the narcotics unit by revising work schedules and assigning an additional Sergeant in the unit, who was to be responsible for "administrative matters." *Complaint*, ¶ 35. This Sergeant not only had limited narcotics experience, but he also had no experience as a narcotics supervisor. Vose believes that the aforementioned employment actions

were undertaken with the knowledge and consent of Defendant Kliment.

In December 2004, Vose received a letter from Defendant Rouse instructing him to prepare a memorandum summarizing the alleged instances of wrongdoing by the major case unit detectives. Prior to this time, Defendant Rouse had not done anything to address the matters previously raised by Vose. At that time, Vose was planning to take an approved vacation leave from December 18, 2004, until January 3, 2005. Vose therefore notified Defendant Rouse through e-mail, which was carbon copied to Defendant Kliment, that he would prepare the requested memorandum upon his return. Vose was on vacation from December 18, 2004, until January 3, 2005. On December 20, 2004, while Vose was out on leave, Defendant Kliment issued a directive revising the work schedule of the narcotics unit effective January 1, 2005.

On February 14, 2005, Vose informed Defendant Rouse that he intended to deliver his memorandum to Defendant Kliment directly. Vose planned to indicate in his memorandum that Defendant Rouse had failed to address Vose's prior complaints concerning the major case unit detectives. On February 23, 2005, during an internal affairs investigation against Vose, Vose was questioned about his involvement in the *Grimm* case and his reporting of information to his superior officers about the detectives. "On February 24, 2005[,] a newspaper article was published regarding the allegations of misconduct and alleged perjury by the detectives." *Complaint*, ¶ 44.

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On March 2, 2005, Vose advised Defendant Kliment through e-mail that his memorandum would be completed shortly. Vose subsequently hand-delivered his memorandum, detailing instances of wrongdoing by the major case unit detectives, and at that time he discussed with Defendant Kliment the substance of his memorandum. At one point in the discussion, Defendant Kliment assured Vose that he would not be transferred to another unit unless he made such a request. A newspaper article was again published, on March 3, 2005, implicating wrongdoing by one of the detectives about whom Vose had earlier complained.

Since January 1, 2005, Vose had been responsible for supervising all searches undertaken by the narcotics unit personnel. This, however, changed. Between the time of Defendant Rouse's appointment of the administrative Sergeant to the narcotics unit and Vose's submission of his memorandum, two questionable drug searches were conducted by the administrative Sergeant and the narcotics unit personnel without Vose's knowledge or consent. The first drug search, which was carried out by the administrative Sergeant and the narcotics unit personnel, resulted in an unlawful execution of an anticipatory search warrant. The second drug search, in which the administrative Sergeant participated, was conducted on the basis of a search warrant obtained by the major case unit detectives about whom Vose had previously complained.

Even after Vose's submission of his memorandum, neither Defendant Kliment nor Defendant Rouse did

anything to address the matters raised by Vose, and Vose continued to be under investigation for his conduct at the courthouse during the *Grimm* trial. On April 12, 2005, Vose met with Defendants Kliment and Rouse, as well as Lt. Rickey Davis and Sergeant Kurt Banks. At the conclusion of the meeting, Kliment instructed Vose either to get along with the major case unit detectives about whom Vose had complained or to submit a transfer request to the patrol division by April 15, 2005. Due to his concern that Defendants Kliment and Rouse were going to continue to cover up his complaints about the detectives, Vose met with and expressed his concerns to City of Springfield Mayor Timothy Davlin. On April 14, 2005, Vose met with Mayor Davlin and informed him about the matters he had previously raised to his supervisor, the two Defendants, and other Department personnel regarding instances of misconduct by the major case unit detectives. Vose believes that Mayor Davlin informed Defendant Kliment of the April 14, 2005, meeting.

In accordance with Defendant Kliment's instructions, Vose submitted a memorandum on April 15, 2005 (April 15, 2005, Memorandum), protesting his unsolicited transfer to the patrol division. On April 18, 2005, Vose found in his office two empty cardboard boxes with his name on the outside. Vose believes that the intended message of this incident was that he would be involuntarily transferred to the patrol division.

On April 19, 2005, Defendant Rouse issued a written reprimand to Vose for the alleged untimely submission

of the April 15, 2005, Memorandum and instructed him to sign the issued reprimand. In response, on April 25, 2005, Vose sent a memorandum to Defendant Kliment protesting the reprimand. On April 27, 2005, pursuant to a directive of Defendant Kliment, Vose was transferred to the patrol division, which became effective May 1, 2005. Defendant Rouse notified Vose of this directive. At the patrol division, Vose was assigned to the second shift which operated from 2:30 p.m. to 11:30 p.m. At the time of his transfer, Vose had not performed patrol duties for the past seven years. His position at the patrol division was a less desirable position than the supervisory position he had held at the narcotics unit.

On May 17, 2005, Vose was issued a written reprimand relating to his alleged misconduct at the courthouse during the *Grimm* trial. Following the transfer, Vose learned that a command officer had expressed to others in the Department that Vose's " 'career in CID [criminal investigation division] is history' and that VOSE 'had burned bridges'." *Complaint*, ¶ 58.

The events leading up to the involuntary transfer, as well as the transfer itself, communicated to Vose that he had no credibility with his superior officers, which in turn, made his continual employment with the Department intolerable. Vose therefore felt forced to resign his employment. Vose accordingly resigned on January 19, 2006.

Vose claims in Counts I and II that Defendants Kliment and Rouse retaliated against him for exercising

his First Amendment rights to freedom of speech by: (1) interfering with the operation of the narcotics unit; (2) issuing two written reprimands, one for the alleged untimely submission of the April 15, 2005, Memorandum and the other for the alleged misconduct during the *Grimm* trial; and (3) transferring/demoting him to the patrol division.

## ANALYSIS

The Defendants move to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. A complaint should not be dismissed, under Rule 12(b)(6), for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Doherty v. City* of Chicago, 75 F.3d 318, 322 (7th Cir.1996). The plaintiff is required only to provide a short and plain statement of his claim " 'that will give the defendant[s] fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Fed.R.Civ.P.* 8(a); *see also Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir.1992). Indeed, the complaint need not plead facts, but must provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. For the reasons stated below, Defendants' Motion to Dismiss is denied.

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To state a First Amendment retaliation claim, "the facts alleged in the complaint must show that (1) the speech in which the plaintiffs engaged was constitutionally protected under the circumstances, and (2) the defendants retaliated against them because of it." *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir.1997) (citing *Caldwell v. City of Elwood, Ind.*, 959 F.2d 670, 672 (7th Cir.1992)). The Supreme Court has established a two-part inquiry to determine if speech is constitutionally protected. *Pickering v. Bd. of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). First, the court must determine whether the plaintiff's speech touched upon a matter of public concern, which means that the speech raises issues of political, social, or other concern to the community. *Gazarkiewicz v. Town of Kingsford Heights, Indiana*, 359 F.3d 933, 940-41 (7th Cir.2004). Speech made pursuant to a public employee's official job duties, however, is not speech implicating matters of public concern. *Delgado v. Jones*, 282 F.3d 511, 518 (7th Cir.2002); *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006). Additionally, speech that furthers purely private interests, including communications made to improve an employee's working conditions, or that concerns a personal employee grievance is not entitled to protection under the Constitution. *Gazarkiewicz*, 359 F.3d at 941; *Gustafson*, 117 F.3d at 1019; *Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir.1988).

If the answer to the first inquiry is yes, then the second step of the analysis requires the courts to balance the employee's interest in speaking and the employer's

interest in efficient public services. *Pickering*, 391 U.S. at 568; *Gazarkiewicz*, 359 F.3d at 940. The application of the balancing test is normally possible only after some discovery has been conducted, and so such analysis is not appropriate at the motion to dismiss stage. *Gustafson*, 117 F.3d at 1019. The Court therefore does not address the second step of the balancing test.

To determine whether the speech at issue falls within the parameter of public concern, the Court must evaluate the content, form, and context of the speech in question, and of these factors, the content of the speech is the most important factor. *Delgado*, 282 F.3d at 516-17; *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir.2004).

With these principles in mind, the Court turns to the merits. Defendants move to dismiss on the grounds that: (1) Vose has failed to allege that the speech in question touched upon matters of public concern because the speech was made pursuant to Vose's official duties; (2) Vose has failed to allege an adverse employment action sufficient to state a claim for § 1983 retaliation; (3) Vose has failed to sufficiently state a claim for constructive discharge; and (4) the instant action is barred by the doctrine of qualified immunity. The Court addresses each of the arguments in turn.

A. *Matter of Public Concern*

With respect to content of Vose's speech, the allegations of the Complaint support a finding that the speech in question addressed a matter of public concern.

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The Seventh Circuit has stated that, in terms of content, speech concerning police protection and public safety raises a matter of public concern. *Delgado*, 282 F.3d at 517 (citing *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir.1990) (en banc)). Indeed, "[e]ffective police work would be hopelessly compromised if police officers could be retaliated against for communicating factual details . . . that bear on the [police] department's ability to conduct an objective investigation." *Id.* at 519. The Seventh Circuit has further noted that the best way to protect the public from unscrupulous and wayward public employees that abuse their positions is the insider who sheds light on his colleagues' improprieties. *Spiegla*, 371 F.3d at 937.

The Complaint alleges that Vose was a supervisor of the narcotics unit. Vose alleges that he discovered wrongdoing by the detectives who worked in a different unit, which he believed should be brought to light and addressed. The Complaint alleges that, based on Vose's own investigation of the matter, Vose concluded that the major case unit detectives were: (1) failing to follow the Department's proper procedures for obtaining search warrants; (2) violating laws applicable to the search warrant process; (3) filing factually inaccurate, misleading, or false affidavits with the courts in support of their applications for search warrants; (4) claiming the use of confidential sources who had not been registered with the Department in accordance with established practices of the Department; (5) using the information obtained from these confidential sources as the basis for search warrant applications made by the

detectives, and (6) using the obtained search warrants for purposes of gathering information on drug investigations, even though no such drug investigation was being undertaken by the narcotics unit. Vose alleges, essentially, that he acted as a whistleblower, shedding light on instances of wrongdoing by his colleagues. "Certainly, a communication by a law enforcement officer that contains information essential to a complete and objective investigation of serious criminal activity is 'content' that implicates public concern." *Delgado*, 282 F.3d at 517-18.

Moreover, Vose alleges that two newspaper articles were published implicating wrongdoing by the same detectives about whom Vose had complained. "While not dispositive of whether speech relates to a matter of public concern, the fact that the press takes interest in the matter is relevant to the determination." *Spiegla*, 371 F.3d at 936 (citing *Gustafson v. Jones*, 290 F.3d 895, 907 (7th Cir.2002)). Vose has therefore adequately alleged in his Complaint that the content of his speech addressed a matter of public concern.

Turning to the form and context of Vose's speech, the Court finds that the allegations of the Complaint further support a finding that Vose spoke out on a matter of public concern. The form and context of the speech in question can be clarified by an examination of Vose's motive for speaking. *Delgado*, 282 F.3d at 518; *see Spiegla*, 371 F.3d at 938 ("Motive matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be

protected if the expression addresses only the personal effect upon the employee."). Vose alleges in his Complaint that following his independent investigation, he concluded that the detectives working in a different unit were engaging in improper conduct which, if allowed to continue, would hinder objective investigations of criminal matters involving illegal drugs. The Complaint alleges that he therefore voiced his concerns to various superior officers, including Defendants Kliment and Rouse. The Complaint further alleges that, at the request of Defendant Kliment, Vose prepared a memorandum detailing instances of wrongdoing by the major case unit detectives in carrying out their official duties. The Complaint asserts that due to the Defendants' failure to resolve the matters raised by Vose, Vose publicized his concerns to the Mayor. The allegations of the Complaint, therefore, show that Vose was not speaking out solely to further his personal interests, to improve his work environment, or to seek redress for a personal grievance against a co-worker or supervisor. *Delgado*, 282 F.3d at 518. Rather, the allegations in the Complaint show that Vose spoke out as a concerned citizen regarding the improper ways in which the major case unit detectives were carrying out their official job duties. Therefore, the allegations in the Complaint show that the form and context of Vose's speech touched upon a matter of public concern.

Vose has also sufficiently alleged in his Complaint that he was subjected to retaliatory employment actions as a result of his speech. The Complaint alleges that Defendants Kliment and Rouse retaliated against Vose

for exercising his First Amendment rights to freedom of speech by: (1) interfering with the operation of the narcotics unit; (2) issuing two written reprimands; (3) transferring/demoting him to the patrol division; and (4) forcing him to resign by making his working conditions intolerable. In viewing the allegations of the Complaint in the light most favorable to Vose, the Court concludes that Vose's Complaint sufficiently states a First Amendment retaliation claim.

Defendants, however, argue that Vose's Complaint fails to state a claim because Vose's speech concerned "matters which fell squarely within his official job duties as a Sergeant." *Defendants' Memorandum in Support of Defendants' Motion to Dismiss the Complaint (d/e 18)*, at 3. In support of their assertion, Defendants rely on *Garcetti* in which the Supreme Court held, as noted *supra*, that a public employee's speech is not entitled to constitutional protection if the speech at issue was made pursuant to the employee's official job duties. *Garcetti*, 126 S.Ct. at 1960. In reviewing the allegations of the Complaint, the relevant case law, and the facts involved in *Garcetti*, the Court finds that *Garcetti* is distinguishable from this case.

The plaintiff in *Garcetti* was a supervising deputy district attorney who complained that he had suffered retaliatory employment actions for speaking out on a matter of public concern. The *Garcetti* plaintiff was a calendar deputy responsible for supervising other lawyers. A defense attorney contacted the plaintiff about a pending criminal case, complaining that there were

inaccuracies in an affidavit used to obtain a search warrant. As a result, the plaintiff investigated this matter during which time he found that the affidavit in question contained several inaccuracies. The plaintiff therefore prepared a memorandum explaining his findings to his superiors and recommended that the case be dismissed. The plaintiff's supervisor, however, disagreed with the plaintiff. The plaintiff then brought suit alleging that he was subjected to various retaliatory employment actions as a result of his speech. The Supreme Court explained that the plaintiff's speech did not involve a matter of public concern, because "[he] spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case. . . ." *Garcetti*, 126 S.Ct. at 1960. The Supreme Court emphasized the fact that the plaintiff wrote the memorandum as part of his duty as calendar deputy, and noted that "[i]t [was] immaterial whether [the plaintiff] experienced some personal gratification from writing the memo. . . ." *Id.*

Unlike *Garcetti*, however, the allegations in the instant Complaint are sufficient to support a finding that Vose did not simply speak as a police officer fulfilling his job responsibility, as opposed to a citizen seeking to expose instances of wrongdoing by his colleagues who worked in a different unit. The Complaint does not demonstrate that Vose's speech was motivated purely by a desire to advance his own private interests. The allegations in the Complaint show that Vose independently investigated the matter and came to the conclusion that several detectives in another unit were engaging in improper conduct, both when carrying out

their official investigative duties and when testifying at the *Grimm* trial. His initial statements to Dodson, Rouse and Kliment, and his subsequent statements to Mayor Davlin, were not all part of his routine official duties.[1] If true, the allegations in the Complaint are enough to show that Vose's speech was not purely about personal matters or about those that fell squarely within Vose's official duties. For these reasons, *Garcetti* is distinguishable from this case. Defendants' request to dismiss on this basis is denied.

B. *Adverse Employment Action*

Defendants next argue that Vose fails to allege an adverse employment action sufficient to state a claim for § 1983 retaliation. Defendants contend that the retaliatory employment actions alleged in the Complaint are not enough to constitute an adverse employment action. In support of their assertion, Defendants cite two Title VII cases: (1) *O'Neal v. City of Chicago*, 392 F.3d 909 (7th Cir.2004) (Title VII gender and race discrimination case); and (2) *Ribando v. United Airlines, Inc.*, 200 F.3d 507 (7th Cir.1999) (Title VII sexual harassment case).

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1. The Court notes that Vose's statements to Kliment and Rouse following his attendance at the Grimm trial, and related to that trial, may well fall within his official duties. However, more factual background is necessary before the Court could say that those allegations should be dismissed. Defendants may re-raise this argument again at summary judgment if the evidence supports their position.

However, the Seventh Circuit has explained that "a § 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964. Rather *[a]ny* deprivation . . . that is likely to deter the exercise of free speech . . . is actionable." *Spiegla*, 371 F.3d at 941 (internal quotations and citations omitted). That is, even minor harassment, including ridiculing an employee for bringing a birthday cake to the office, may be sufficient to deter the exercise of First Amendment rights. *Id.* (citing *Bart v. Telford*, 677 F.2d 622, 624 (7th Cir.1982)). Here, the Complaint alleges that in retaliation for voicing his concerns, both orally and in writing, about the wrongdoing by the major case unit detectives, Vose was subjected to the following retaliatory employment actions by Defendants Rouse and Kliment: (1) interference with his job duties as a supervisor of the narcotics unit; (2) issuance of two written reprimands; (3) internal affairs investigation; (4) demotion/transfer to a position in the patrol division; and (5) constructive discharge. The alleged employment actions are sufficient to support a First Amendment retaliation claim. Defendants' request to dismiss on this basis is denied.

C. *Constructive Discharge*

Defendants next argue that Vose has failed adequately to allege a claim for a constructive discharge. The Court notes that Vose does not bring a separate cause of action for constructive discharge in his Complaint. However, to the extent that Vose alleges that

he was constructively discharged in retaliation for speaking out on a matter of public concern, the Court finds that the alleged employment action is sufficient to state a basis for a First Amendment retaliation claim. The doctrine of constructive discharge means that the employee felt compelled to resign because the working conditions became so intolerable. *Levenstein v. Salafsky*, 414 F .3d 767, 774 (7th Cir.2005); *Carlson v. Midway R-1 School Dist.*, 53 F.3d 878, 880 (8th Cir.1995). As explained *supra*, in § 1983 cases any employment action that may deter the exercise of First Amendment rights would be sufficient to support a First Amendment retaliation claim. Vose alleges in his Complaint that the various retaliatory employment actions to which he was subjected, including the written reprimands, interference with his job duties, and demotion/transfer to the patrol division, made his continual employment with the Department intolerable and forced him to resign from the Department because he felt that he had no credibility with his superior officers. The alleged employment action is sufficient to support a First Amendment retaliation claim. Defendants' Motion to Dismiss on this basis is denied.

D. *Qualified Immunity*

Defendants lastly argue that they are entitled to qualified immunity. "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.' " *Wilson v.. Layne*, 526 US. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The Supreme Court directs that a federal court considering a defense of qualified immunity must follow a two-step analysis. First, the court must rule on "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As discussed supra, Vose has adequately alleged that the Defendants retaliated against him for exercising his First Amendment rights in violation of his First and Fourteenth Amendment rights.

The second step of the analysis then, "is to ask whether the right was clearly established." *Id.* A right is clearly established if "it would be clear to a reasonable officer that [his] conduct was unlawful in the situation he confronted." *Id.* at 202. Before the events at issue here, the Seventh Circuit, in 1997 and 2002, stated that a police officer, who speaks out to expose problems in the operation of a police department or corruption in the police department, is entitled to constitutional protection. *Gustafson*, 117 F.3d at 1019; *Delgado*, 282 F.3d at 519. The Seventh Circuit has also stated, before the events at issue here, that a § 1983 case does not require an adverse employment action within the meaning of Title VII. *Bart*, 677 F.2d at 624; *Spiegla*, 371 F.3d at 941. Even ridiculing an employee for bringing a birthday cake to the office may deter the exercise of the employee's First Amendment rights. *Bart*, 677 F.2d at 624.

*Appendix B*

Vose alleges that: (1) based on his independent investigation, he discovered that the detectives working in a different unit were engaging in improper conduct, both when carrying out their job duties and when testifying at a trial; (2) he raised these issues, both orally and in writing, to his superior officers (including Defendants Rouse and Kliment), as well as to the Mayor; (3) he was subjected to various retaliatory employment actions, including written reprimands, interference with his job duties, and demotion, as a result of expressing such concerns; and (4) the working conditions became so intolerable that he felt compelled to resign. Viewing these allegations as true and in the light most favorable to Vose, the Court finds that Vose's right to speak out on matters relating to misconduct of police officers without being subjected to retaliatory employment actions was clearly established before the events of this case.

Defendants, however, argue that they are entitled to qualified immunity because the applicable law, namely the *Garcetti* ruling issued May 30, 2006, was not clearly established at the time of the events at issue here, which occurred sometime between 2004 and January 19, 2006, the date of Vose's resignation. Defendants contend that the *Garcetti* ruling clarified and narrowed the rights of government employees to speak out on issues which are inherently part of their job duties. The essence of Defendants' contention appears to be that they are not liable because their alleged conduct did not violate Vose's First Amendment rights, based on *Garcetti*. However, as discussed *supra*, qualified immunity protects a public official from liability for civil damages when his conduct

did violate another person's constitutional rights, but the applicable law was not clearly established at the time of the events in question so that the official would have reasonably known that his conduct violated a constitutional right. If the Defendants' conduct was legal, then qualified immunity does not apply. *Saucier*, 533 U.S. at 201. Defendants' argument, therefore, is not consistent with the affirmative defense of qualified immunity.

In any event, Defendants' arguments for qualified immunity based on *Garcetti* nonetheless lack merit. Before the events at issue here, the Seventh Circuit had held that a public employee's speech made pursuant to his routine job duties was not entitled to protection under the Constitution. *Delgado*, 282 F.3d at 519; *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir.2001). As such, *Garcetti* neither clarified nor narrowed the rights of government employees to speak out on matters which are inherently part of their job duties, meaning *Garcetti* did not change the law applicable to First Amendment actions in the Seventh Circuit. Moreover, the alleged retaliatory actions at issue here, as alleged in the Complaint, all occurred prior to the issuance of the *Garcetti* decision, thereby "eliminating any possibility of reliance" on *Garcetti*. *Delgado*, 282 F.3d at 520. The Defendants are, therefore, not entitled to qualified immunity. Defendants' request to dismiss on this basis is denied.

*Appendix B*

THEREFORE, for the reasons set forth above, Defendants Kliment and Rouse's Motion to Dismiss (d/e 17) is DENIED.

IT IS THEREFORE SO ORDERED.

ENTER: March 8, 2007.

FOR THE COURT:

s/ Jeanne E. Scott
JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE